LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JAN 9 1953

No. 303

In the Supreme Court of the United States

OCTOBER TERM, 1952

CALMAR STEAMSHIP CORPORATION, PETITIONER

v.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, AND EDINBURGH ASSURANCE CO., LTD. ET AL., INSURANCE COMPANIES MEMBERS OF THE INSTITUTE OF LONDON UNDERWRITERS, AND EXCESS INSURANCE COMPANY LIMITED, OF LONDON, A BRITISH CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
The interest of the United States	2
Statement	4
Summary of argument	17
Argument:	
The duration of the war risk insurance policies on the *Portmar*	24
A. The general principles applicable to departures by insured vessels from the regular course of the insured voyage	26
B. Under the applicable principles, it cannot be said that the insurance on the *Portmar* terminated on January 5, 1942	41
Conclusion	59

CITATIONS

Cases:

Allanwilde Transp. Corp. v. *Vacuum Oil Co.*, 248 U.S. 377	35
Atkinson v. *Ritchie* (1809) 10 East 530	34
Bank Line v. *Capel* [1919] A. C. 435	34
Ben Hann, The, 75 Lloyds List R. 187	29
Betesh v. *Fire Ass'n of Philadelphia*, 187 F. 2d 526	30, 32
British & Foreign Marine Ins. Co. v. *Gaunt* [1921] 2 AC 41	27
Brotherston v. *Barber* (1816) 5 M. & S. 418	15
Burgess v. *Equitable Marine Ins. Co.*, 126 Mass. 70	29
Calmar Steamship Corp. v. *United States*, October Term, 1952, No. 262	17
Claveresk, The, 264 Fed. 276	34, 36, 38
Coles v. *Marine Ins. Co.*, 3 Wash. CC 159	26
Columbian Insurance Co. v. *Catlett*, 12 Wheat. 383	27
Constable v. *National Steamship Co.*, 154 U.S. 51	27
Countess of Warwick Steamship Co. v. *Le Nickel Societe Anonyme* [1918] 1 K. B. 372	34
Crocker v. *Jackson*, Sprague R. 141, quoted in Arnould on *Marine Insurance*, 12th ed. (1939) § 434	28
De La Rama SS Co. v. *Ellis*, 149 F. 2d 61	56
De La Rama SS, Inc. v. *United States*, No. 368, this Term	3
Driscol v. *Bovil* (1798) 1 B & P 313	27
Driscol v. *Passmore* (1798) 1 B & P 200	27
Elton v. *Brogden* (1747) 2 Strange 1264	27
Equitable Ins. Co. v. *Hearne*, 20 Wall. 494	58
Fountain v. *Filson*, 336 U.S. 681	50
Frankmere, The 278 Fed. 139, certiorari denied, 257 U.S. 662	34

Cases—Continued

	Page
Geipel v. *Smith* (1872) L. R. 7 Q.B. 404	34
Hamilton v. *Mendes* (1761) 2 Burr. 1198	15
Hearne v. *Marine Ins. Co.*, 20 Wall. 488	36
Heilgers & Co. v. *Cambrian Steam Nav. Co.* (1917) 33 Times L. R. 348, affirmed (1917) 34 Times L. R. 72	34
Henjes v. *Aetna Ins. Co.*, 132 F. 2d 715	53
Hirji Mulji v. *Cheong Yue SS Co.* [1926] A.C. 497	34
Horlock v. *Beal* [1916] 1 A.C. 486	34
Hostetter v. *Park*, 137 U.S. 30	26, 27
Hughes v. *Union Ins. Co.*, 8 Wheat. 294	26
Isle of Mull, The, 278 Fed. 131, certiorari denied, 257 U.S. 662	34, 38, 39
Jackman v. *Rosenbaum*, 260 U.S. 22	36
Jackson v. *Union Marine Insurance Co.* (1874) L. R. 10 C.P. 125	34
Kingston v. *Girard*, 4 Dallas 274	27
Knickerbocker Life Ins. Co. v. *Norton*, 96 U.S. 234	53
Lawrence v. *Sydebotham* (1805) 6 East 45	28
Lloyd Royal Belge Societe Anonyme v. *Stathatos* (1917) 34 Times L. R. 70, affirming (1917) 33 Times L. R. 390	35
McMaster v. *New York Life Ins. Co.*, 183 U.S. 25	58
Marine Ins. Co. of Alexandria v. *Tucker*, 3 Cranch 357	28
Maryland Ins. Co. v. *LeRoy*, 7 Cranch 26	29
Metropolitan Water Bd. v. *Dick, Kerr & Co.* [1918] A.C. 119	36
Middlewood v. *Blakes* (1797) 7 T.R. 162, 101 Eng. Reprint 911	29
Naylor v. *Taylor* (1829) 9 B & C 718	15
New Orleans T & M Ry. Co. v. *Union Marine Ins. Co.*, 286 Fed. 32	58
New York Firemen Ins. Co. v. *Lawrence* (1816) 14 Johnson (N.Y.) 46	28, 29
Oliver v. *Maryland Ins. Co.*, 7 Cranch 487	27
O'Reilly v. *Royal Exchange Assurance* (1815) 4 Camp. 246	29
Paradine v. *Jane* (1647) Aleyn 26	34
Phelps v. *Auldjo* (1810) 2 Camp 350	30
Polurrian Steamship Co., Ltd. v. *Young*. [1915] 1 K.B. 922	16
Rickards v. *Forestal Land Timber & Railways Co., Ltd.* [1942] A.C. 50	15, 28, 30-31
Sanday & Co. v. *British and Foreign Marine Ins. Co.* [1915] 2 K.B. 781, [1916] 1 A.C. 650	32
Scaramanga v. *Stamp* (1880) 49 L.J. C.P. 674	28
Scott v. *Thompson* (1805) 1 B & P NR 181	27, 29, 30
Stipcich v. *Metropolitan Life Ins. Co.*, 277 U.S. 311	58
Styria, The, 101 Fed. 728, modified on other grounds, 186 U.S. 1	36, 56

Cases—Continued

	Page
Swan v. *Union Insurance Co. of Md.*, 3 Wheat. 168	58
Tamplin S.S. Co. v. *Anglo-Mexican Petroleum Co., Ltd.* [1916] 2 A.C. 397	34, 35, 38
Taylor v. *Caldwell* (1863) 3 B & S 826	34
Texas Co. v. *Hogarth Shipping Co.*, 256 U.S. 619	34, 35
Travelers Protective Ass'n v. *Jones*, 91 F. 2d 377	53
United States v. *Caltex*, No. 16, decided Dec. 8, 1952	47
United States v. *Russell*, 13 Wall. 623	29
Vernon City, The, 70 Lloyds List R. 279	29
Willdomino, The v. *Citro Chemical Co.*, 272 U.S. 718	27

Statutes:

Act of June 29, 1940, 54 Stat. 689, amended by Act of April 11, 1942, 56 Stat. 214, 46 U.S.C. 1128	2-3
Act of June 6, 1941, § 3, 55 Stat. 243, as amended 56 Stat. 370, 57 Stat. 51, 50 U.S.C. 1273	3
Act of July 25, 1947, 61 Stat. 449	3
Act of September 7, 1950:	
Sec. 1202 (a) 64 Stat. 773, 46 U.S.C., Supp. V, 1282	3
Sec. 1214, 64 Stat. 777, 46 U.S.C., Supp. V, 1294	3
Marine Insurance Act, 1906, 6 Edw. 7, c. 41:	
Section 45	28
Section 46	26, 27
Section 48	27
Section 49	27, 29
Section 49(b)	28
Section 49(d)	28
Section 49(e)	28
Section 49(f)	28
Section 61	16
Merchant Marine Act of 1936, 49 Stat. 1985	2

Miscellaneous:

Arnould on *Marine Insurance*, 12th ed. (1939):	
Sec. 434	28
Sec. 435	29, 32
Executive Order 9054, February 7, 1942, 7 F.R. 837	46
3 Kent, *Commentaries*, 14th ed.:	
P. 312	26
P. 315	27
P. 317	28

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 303

CALMAR STEAMSHIP CORPORATION, PETITIONER

v.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, AND EDINBURGH ASSURANCE CO., LTD. ET AL., INSURANCE COMPANIES MEMBERS OF THE INSTITUTE OF LONDON UNDERWRITERS, AND EXCESS INSURANCE COMPANY LIMITED, OF LONDON, A BRITISH CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of New York (R. 700-756) are reported at 103 F. Supp. 243. The opinion of the United States

Court of Appeals for the Second Circuit (R. 792-802) is reported at 197 F. 2d 795.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 12, 1952 (R. 805). A petition for a rehearing was denied on June 6, 1952 (R. 820). The petition for a writ of certiorari was filed on August 28, 1952, and granted on October 20, 1952 (R. 822). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether war risk insurance on a vessel time-chartered to the United States for a round voyage to Australia necessarily terminated on January 5, 1942, when (in the view of the Court of Appeals) a governmental seizure occurred, on the analogy that a charter party for the same voyage would have terminated on that day.

THE INTEREST OF THE UNITED STATES

This case presents an important question concerning the scope of the protection afforded by war risk insurance policies when the insured voyage is interrupted by a governmental restraint in connection with war operations. The interest of the United States stems partly from the fact that it is itself a war risk and marine underwriter [1] and the

[1] By a 1940 amendment to the Merchant Marine Act of 1936, 49 Stat. 1985, the Maritime Commission was authorized to provide, in certain instances, marine insurance and reinsurance against loss or damage by the risks of war and reinsurance against loss or damage by marine risks. Act of June

determination by this Court of the issues involved will bear on the Government's liability as insurer on other occasions. Also, as noted in the memorandum submitted by the Government as *amicus curiae* in connection with the petition for a writ of certiorari, the interest of the United States in the outcome of this litigation is partly financial (memorandum, p. 2), for the policies were written to cover a vessel that had been chartered by the United States, the United States paid for the premiums, and the vessel's owner, petitioner herein, has asserted in a separate action brought against the United States that the latter is liable on the claimed loss if the insurance issued by respondents was not in effect. See *Calmar Steamship Corp.* v. *United States*, October Term, 1952, No. 262. Finally, since dispo-

---

29, 1940, 54 Stat. 689, amended by Act of April 11, 1942, 56 Stat. 214, 46 U.S.C. 1128. The 1940 amendment was repealed by Act of July 25, 1947, 61 Stat. 449, on the ground that authority to issue such insurance was no longer needed. See the Brief for the United States in *De La Rama Steamship Company Inc.* v. *United States*, No. 368, this Term, pp. 19-20, 21. After the outbreak of hostilities in Korea, Congress added a new title to the Merchant Marine Act which, *inter alia*, permits the Secretary of Commerce "with the approval of the President, and after such consultation with interested agencies of the Government as the President may require, [to] provide insurance and reinsurance against loss or damage by war risks in the manner and to the extent provided in this title, whenever it appears to the Secretary that such insurance adequate for the needs of the water-borne commerce of the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States." Act of September 7, 1950, § 1202 (a), 64 Stat. 773, 46 U.S.C., Supp. V, 1282. This authority will expire on September 7, 1955. § 1214, 64 Stat. 777, 46 U.S.C., Supp. V, 1294. And see also Act of June 6, 1941, § 3, 55 Stat. 243, as amended, 56 Stat. 370, 57 Stat. 51, 50 U.S.C. 1273.

sition of this suit may affect the attitude of shipowners in the face of governmental restraints in times of crisis, the United States is interested in encouraging their full, ungrudging cooperation and in minimizing parleys that tend to impede needed emergency action. In this connection, it is opposed to any rule tending to impel the American owner, whether as charterer or otherwise, to be unwilling to accept freely governmental restraints on shipping in periods of grave national emergencies.

STATEMENT

On November 21, 1941, petitioner entered into a voyage charter with the United States "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports" (R. 19); the vessel was petitioner's *Portmar*, which had a cargo capacity of 428,116 cubic feet with a deadweight capacity of 8600 tons (R. 589). The charter provided in Article 2.17 that either the United States or petitioner at the expense of the United States was to provide war risk insurance payable to petitioner in the amount of the vessel's valuation ($860,000). This insurance was to be under full form of American Institute of Marine Underwriters war risk policies. (R. 35.)

On November 26 and 27, 1941, respondent British underwriters initialed war risk binders covering the *Portmar* on the charter voyage in the amount of $860,000 (R. 709-710). On January 19, 1942, respondents issued three policies on the "American

Institute TIME (HULLS) (July 1, 1941)" form with war risk clauses and riders attached. This form had been published by the American Institute of Marine Underwriters after its adoption and promulgation by the American Marine Insurance Syndicate. The insured voyage was described in each policy as being "at and from a UNITED STATES PACIFIC port to port or ports in the PHILIPPINE ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal) Via port or ports in any order and for twenty-four hours after arrival." (R. 70, 710-11) By the war risk endorsement to the basic marine hull form, the policies were made to cover:

> * * * damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations * * * (R. 70)

and specifically "the risks of military and naval aircraft" (R. 70, 714). A rider to the policies ("B. C. 2") provided that:

> Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the

trend was more evident. A private citizen might well have assumed that a large cargo vessel would be sent back to the United States shortly. Petitioner was explicitly informed in mid-January that within a month the Maritime Commission intended to return the *Portmar*.

The Court of Appeals, in 1952, drew its own inferences as to the nature of the restraint imposed upon the *Portmar*. But on January 5, 1942, other inferences were at least equally possible and consistent with the facts. In these circumstances, the District Court should have determined the nature of the restraint as it was objectively, and as it must have appeared to the insured. The finding is of the type that should ordinarily be left to the trial court. Apparently, neither petitioner nor respondent adduced its proof on the basis of the principles subsequently laid down by the Court of Appeals.

Nor did the Court of Appeals seek to determine what petitioners' expectations *should* have been at Brisbane on January 5, 1942. If the insurance ended on January 5, respondent underwriters received a substantial windfall in that, after taking a premium of $13,000 for assuming certain risks over a period extending to April 1942, they escaped exposure to risks for the three months of that period coinciding with the most acute stage of the insured's needs for war risk insurance. When the nature of war risk insurance is examined, it is difficult to justify disregard of the legitimate expectations of the insured and its need to maintain

an unbroken sequence of coverage. If war risk insurance is to be more than a name, the insured should have a reasonable time to appraise what has taken place, to recognize its implications, and then to obtain the protection the new situation requires. The brunt of uncertainty should rest on the underwriters, who in this case issued the war risk insurance at the end of November 1941 when the need for protection against the consequences of war was substantially increased. As pointed out above (*supra*, pp. 19-20), the underwriters may properly be held for a longer period after the initiation of a governmental restraint than may the owner under a charter.

From the standpoint of the owner of the *Portmar*, its legitimate expectations were that insurance protection continued. So long as it was uncertain that the interruption, if any, was more than temporary, the insurance should protect against loss as a result of war risk. Conceding that (in the absence of provision in the policy to the contrary) if a vessel covered by a voyage policy is requisitioned for a period beyond the expected duration of the voyage the owner has to reinsure, we submit that the insured must be on notice at the time that such a requisition has occurred and must have a reasonable time to obtain the new coverage it needs. In holding that the insurance terminated on January 5, 1942, the Court of Appeals failed, we believe, to consider the events as they were unfolded to the master and his owner and the unresolved situation that prevailed in January and February, 1942. It

of an American naval officer who informed the master that the order was issued with the "knowledge and understanding of the American authorities." (R. 280, 717-18) The vessel sailed from Suva on December 22 and arrived at Sydney on December 30 (R. 718). As ordered, the master reported to the Australian Naval Control Officer who instructed him to continue on to Brisbane, Australia (R. 718). Prior to departure from Sydney on January 2, 1942, the master was in constant contact with the local United States Consul who informed him that he should cooperate and follow the Australian commands (R. 284, 719).

On January 5, 1942, the *Portmar* entered the harbor at Brisbane where, under the direction of American military authorities, her cargo was discharged, sorted, and in part reloaded along with material that had been brought in on other American ships (R. 285-86, 719). The American Army officers then instructed the vessel to proceed to Darwin with her cargo under routing orders received from the Australian Naval Control Officer (R. 287, 719). After obtaining further assurance from the Brisbane American Consul that he was to obey Australian orders, the master departed on January 9 (R. 719). When he reached the Torres Strait en route to Darwin he was signalled to enter the harbor at Thursday Island and was thereupon placed in a convoy with two other American vessels. The convoy, escorted by two Australian corvettes, reached Darwin on January 19. (R. 719.)

Up to that date petitioner had received no word

whatsoever as to the vessel's whereabouts. Naval officials in the United States had been able to furnish no information other than that the vessel was "safely afloat". (R. 141.) The master had endeavored to send cables to petitioner from Suva, Sydney, and Brisbane but he was informed on each occasion that security restrictions prevented communication (R. 718-19). In addition, while at Suva, he wrote two letters to petitioner, in one of which he detailed the situation as of that time. Neither of these letters, left with a naval officer to be mailed, ever reached their destination. (R. 718.) On January 19, however, petitioner was notified by an agent of the Maritime Commission that the vessel was in Australia but would load chrome ore at New Caledonia the latter part of February for discharge at Philadelphia in April (R. 142-43, 720). Three days later, confirmation that the vessel was in Australia was sent to petitioner in New York by its San Francisco office (R. 720). Assuming that the vessel had been diverted by government orders, petitioner cabled respondents to this effect on January 24, requesting that the vessel be held covered pending further advices. Respondents agreed to comply with this request and so notified petitioner by letter of February 6. (R. 720.)

In the meantime, the *Portmar* lay at anchor in Darwin Harbor from January 19 to January 31 awaiting a discharge berth. She docked on the latter date and her cargo was unloaded, with the exception of 2000 drums of gasoline, under the direction of an American Army colonel. (R. 290, 720-

21.) The master again attempted unsuccessfully to cable petitioner (R. 721). On February 4, the Australian authorities ordered the *Portmar* to transport the gasoline to Wyndham in Western Australia and then to return to Darwin (R. 721). The master raised an objection with the American Naval observer to accepting orders given by foreign naval authorities and stated his opinion that the smaller British and Australian ships in the harbor were better fitted for the voyage to Wyndham. The observer answered that co-operation was necessary and that the *Portmar* was the most available vessel for the journey. (R. 290-91, 721.) The *Portmar* sailed from Darwin on February 4 in a convoy escorted by a corvette, arriving at Wyndham on February 8 and discharging the gasoline. The vessel returned to Darwin two days later, anchoring on February 12, 1942. (R. 721.)

On February 13, the American colonel supervising cargo operations informed the master that the *Portmar* had been selected to carry United States troops and equipment from Darwin to Koepang on Timor Island. The vessel was loaded with field guns, ammunition, and between 300 and 400 officers and enlisted men (R. 296, 721-2), and, on February 15, left Darwin with three other merchant ships in a convoy headed by an American cruiser, routing orders having been issued by an Australian control officer at a pre-departure conference (R. 722). The Island of Timor was still in Allied possession but Japanese forces had control of the surrounding waters and maintained aerial

supremacy (R. 722). While crossing the Timor Sea on the first day out, the convoy was attacked by enemy aircraft but continued on its route (R. 722-23). The following morning, February 16, another attack occurred and, while not suffering a direct hit, the *Portmar* was severely shaken and somewhat damaged. Shortly thereafter, the convoy commander signalled that the vessels were to turn back. The *Portmar* anchored in the Darwin harbor on February 18, awaiting her turn at a discharging berth. (R. 723.)

On the morning of February 19, Japanese aircraft attacked Darwin harbor. The *Portmar* suffered severe damage from continuous machine-gun and aerial cannon fire. She began taking in water, her pumps became clogged, her navigating equipment was destroyed, and her deck-house wrecked. (R. 312-29, 724.) The master, realizing that the vessel might sink if left in the harbor, ran her aground (R. 329-31). She was taking in water rapidly through shrapnel perforations below the water line and was listing badly. The chief engineer reported that he was unable to control the entry of water and feared the boilers might blow up as the listing increased. (R. 725-26.) The master then directed the abandonment of ship by the crew but remained on board himself for most of the following two days (R. 726). On February 21, an American Army officer accompanied by a professional salvor boarded the *Portmar* and discussed the prospect of salvaging the badly needed field guns that were stowed in the hold. No reference

was made to the salvaging of the vessel itself. (R. 727.) Thereafter the master went ashore and unsuccessfully endeavored once more to contact petitioner (R. 727-28).

Between February 24 and March 2, 1942, the master was aboard the *Portmar* at frequent intervals. No work was done or could have been done on the vessel, however, since labor was unavailable, continuous attacks by the enemy made work during the day impracticable (R. 346), and the *Portmar's* crew members were themselves employed at night in the unloading of cargo on another vessel (R. 729). The master when he went on the *Portmar* for the last time in Darwin on March 3, 1942, was of the opinion that it was impossible to salve the ship because of the lack of facilities at Darwin for raising, towing, or repairing her; the complete domination of Japanese forces in the surrounding area; and the poor condition of the vessel (R. 730). He and the chief officer believed that the cost of recovering and repairing the vessel, if it could at some future time be accomplished, would exceed the valuation of the ship (R. 730, 731).

Under military orders the master left Darwin with his crew for Melbourne on March 10, 1942 (R. 732). Upon arrival he noted a protest before the American Consul and a notary public, and retained a firm of solicitors to represent petitioner's interests. He remained in Australia himself after the rest of the ship's company had been repatriated to the United States in April 1942. (R. 733.)

In the meantime, in the course of salvage opera-

tions undertaken in Darwin to remove the artillery from the *Portmar's* holds, the salvor came to the conclusion that the vessel might be floated and was directed by the American Army officer to attempt to do so (R. 733). After a temporary patching of shrapnel holes, the vessel was pumped out and on April 5 floated. The master learned of this development in Melbourne on April 13. (R. 733.)

Under direction of the United States Army, the *Portmar* was towed through enemy-infested waters to Brisbane by the salvor in June and July 1942 (R. 736). This towing operation, as well as the prior salvaging of the vessel, was accomplished by the use of Australian government facilities. The desperate war situation would have made it impossible for a private commercial concern to obtain the use of comparable equipment. The actual cost of the services and equipment furnished in raising and towing the *Portmar* was $55,130. The reasonable value of the services was much greater. (R. 736.)[2]

At Brisbane the vessel was surveyed and the cost of repairing her in such a manner as would regain her former classification was estimated at approximately $390,000. Such repairs could not have been made by other than military or government agencies at the time. (R. 737.) Therefore, the United States Army, utilizing its own enlisted personnel

---

[2] The Australian government and the salvor subsequently made demand for $325,000 and $162,000, respectively, as an award for the salvage services rendered the Portmar. The High Court of Australia dismissed the government claim but awarded the latter a total of approximately $20,000. Petitioner satisfied this judgment in 1944 (R. 737-40).

and pieces of scrap metal available in the area, undertook to make temporary repairs which, while extensive, were not undertaken to restore the vessel to its former condition but merely to permit operation in Australian waters during the war (R. 738).

On November 17, 1942, title and possession of the *Portmar* were requisitioned by the War Shipping Administration and she was taken to Sydney (R. 623, 738). There additional repairs were made and a further survey of the vessel was undertaken at which the owner, the war risk underwriters, and the United States were represented (R. 738). On February 15, 1943, the surveyors issued a joint report which stated that the cost of restoration to pre-war condition would be roughly $96,000. This figure did not purport to measure the extent of the damage suffered by the *Portmar* since a large amount of repair work had already been done at Brisbane. (R. 739.)

While these events were transpiring in Australia, the following occurred in the United States. On February 18, 1942, the Maritime Commission notified petitioner by letter that the *Portmar* was in Darwin (R. 145-6). Petitioner received a telegram from the War Shipping Administration on February 23 advising that the *Portmar* was reported to have been badly damaged in an air-raid on Darwin but that the extent of damage was unknown (R. 603). On March 24, a cable from the master in Melbourne advised that in his opinion the extensive damage to the ship made salvage impossible (R. 604). On March 30, the Melbourne so-

licitors cabled petitioner recommending a tender of abandonment on the basis of the master's report that the vessel was a constructive total loss (R. 605). On April 2, a second cable from the master was received outlining the vessel's journeys after December 7 (R. 603).[3] On April 4, 1942, petitioner received a letter from the Maritime Commission stating that a dispatch from the Observer at Melbourne had been received reading "Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store" (R. 606). On April 7, 1942, petitioner instructed its insurance brokers to tender abandonment of its interest in the *Portmar* to respondents. Abandonment was tendered on April 8 through the London correspondent (R. 587). The underwriters rejected the tender of abandonment but agreed to place petitioner in the same position as if a writ had already been issued in the action (R. 588-89).[4] See *Rickards* v. *Forestal Land, Timber & Railways Co.*, [1942] A.C. 50, 84-85.

---

[3] This cable was in response to a cable sent by petitioner to the master on March 27, requesting the vessel's itinerary after leaving the United States (R. 605). Prior to its receipt, petitioner knew only that the vessel had gone to Darwin. Petitioner first obtained the details of the "restraint" in early May 1942, when the *Portmar* crew arrived at San Francisco (R. 157).

[4] It has been held in England that, although a constructive total loss has occurred and due notice of abandonment given, the insured cannot recover for a total loss if before the action is commenced the subject matter of the insurance is restored to such an extent that possession might be regained. *Naylor* v. *Taylor* (1829) 9 B & C 718; *Brotherston* v. *Barber* (1816) 5 M & S 418; *Hamilton* v. *Mendes* (1761) 2 Burr. 1198. It

On January 8, 1943, petitioner's brokers received a letter from their London correspondent to the effect that respondents declined any liability in connection with the loss of the *Portmar* because in their opinion their liability on the policies terminated upon the arrival of the vessel in Australia and the subsequent voyages represented "an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia" (R. 590).

On February 11, 1944, petitioner filed a libel against the United States (R. 5-18) alleging *inter alia* that, if the policies issued by respondents did not cover the claimed loss, the United States was liable as an insurer under Article 2.17 of the charter for the damages resulting from the Darwin attack (R. 16). On November 10, 1944, petitioner filed a libel against respondents in the same court seeking recovery of the face amount of the policies, in addition to $42,762.12 which represented "sue and labor" expenditures purportedly incurred in the interest of the vessel after February 19, 1942 (R. 45-69). The actions were consolidated for the purpose of trial.

---

is uncertain whether this principle is still the law in that country [cf. Marine Insurance Act, 1906, 6 Edw. 7, c. 41 § 61; *Polurrian Steamship Co., Ltd.* v. *Young* (1915) 1 K. B. 922] but irrespective of its present vitality, respondents' concession fixed petitioner's right of recovery as of the time when the notice of abandonment was submitted by regarding the action as having been commenced at such time.

The District Court held that the claimed loss was covered by the policies and that the vessel was a "constructive total loss." (R. 700-756) Judgment was awarded against respondents for approximately $895,000 plus interest (R. 756). The District Court further held that while it had jurisdiction over the libel against the United States by virtue of Sections 1 and 2 of the Suits in Admiralty Act, 46 U.S.C. 741-742 (R. 742), the *Portmar* did not sustain any loss or damages from a cause which would render the United States liable under the charter (R. 756).

The Court of Appeals reversed, holding (a) that the insurance coverage issued by respondents on the *Portmar* terminated on January 5, 1942, when the vessel was seized at Brisbane, and (b) that the District Court was without jurisdiction under the Suits in Admiralty Act over the libel against the United States (R. 792-804). The instant petitioner seeks review of the first determination.[5]

SUMMARY OF ARGUMENT

The Court of Appeals assumed that the *Free of British Capture* rider (*supra*, pp. 5-6) in the war risk policies, on which petitioner had relied, along with the special "held covered" agreement of February 6, 1942 (*supra*, p. 9), applied only after it had first been established that the policies were in force at the time of the claimed loss. It therefore did

[5] The Court also granted a writ of certiorari on October 20, 1952, to review the latter determination (R. 822). *Calmar Steamship Corp.* v. *United States*, October Term, 1952, No 262.

not consider the meaning of the rider. In its view, the insurance coverage ended on January 5, 1942, because there was then a departure working a frustration of the underlying venture, arising out of a restraint or requisition which appeared likely to outlast the expected duration of the charter period. We suggest, however, that on the principles applicable to departures from the course of a voyage, the war risk protection had not ended by February 19, 1942, the date of the claimed loss.

A. In every contract of marine insurance covering a vessel on a particular voyage, there is an implied warranty that she will strictly maintain the regular course of that voyage. But this implied warranty is not breached when the vessel is compelled to deviate from its course or to abandon the original *terminus ad quem* because of considerations of safety or other circumstances beyond the control of the master or owner. Under these principles, the *Portmar* neither deviated nor changed its voyage, as those terms are understood in marine insurance; the master acted in compliance with lawful commands that he was legally bound to obey, and therefore there was no breach of the warranty that the vessel would maintain her scheduled course.

Of course, regard must be given to the grounds and circumstances of the previous decisions holding that an involuntary departure did not terminate a particular policy, which remained in force at the time of the claimed loss. In general, the in-

surance has been found effective where the restraint operated as an immediate peril from the standpoint of the insured and where the peril was one of which the underwriters should have been cognizant. In these circumstances, if the insurance is not warranted free of claims arising from a given risk, the underwriters are taken to have assumed that risk in exchange for the premium.

For this reason, among others, the Court of Appeals' analogy between an insurance policy covering a vessel on a chartered voyage and the charter party itself does not seem apt. A charter party is a contract designed to allow the charterer to use the vessel in a defined way for a prescribed period. If the vessel is rendered incapable of performing its charter services for a long period, the foundation is cut away—on general principles of supervening commercial frustration. The charterer has to give up the use of the ship but he also is freed from paying charter hire. But this "average reciprocity of advantage", normally achieved in the owner-charterer relationship on termination of the charter by a detention or requisition, is not paralleled in the insurer-insured relationship. The insurer will invariably retain the premium and suffer no detriment while the insured invariably forfeits continued protection and suffers the loss of premium. Since the very purpose of insurance is relief from uncertainty, the insured should be able to know when the prior insurance ends so that it may make immediate arrangements for procuring

effective new insurance and may thus avoid a break in coverage. In the owner-charterer relationship, neither the owner nor the charterer has expressly assumed the consequences of war and nothing inherent in the nature of the charter warrants placing these consequences on either party. The courts in charter cases were free to allocate the benefits on an arbitrary basis, of easy application and meting out rough justice. But insurance policies, in the nature of things, allocate many of the risks of uncertainty to underwriters, and there is therefore justification for placing some of the risk incident to "frustration" on the insurer and for regarding ease of application as a minor consideration in risk allocation.

We recognize, nevertheless, that a particular departure, though under compulsion, may not be the result of a peril at all, as when a vessel is requisitioned by the Government for a term of years and put to an entirely new use, normally to the economic advantage of the insured. Unless the policy stipulates to the contrary, it would not be fair to hold the insurer for the entire period of the requisition for the single premium fixed on the basis of a particular voyage of a rather definite length. But the question is always whether there has been such a requisition as should be regarded as a completely new employment, for which the owner should obtain new insurance.

B. On these applicable principles, the *Portmar* did not depart from the course of its insured voyage on January 5, 1942, or at any time prior to Feb-

ruary 19, 1942, so as to terminate the insurance. At any rate, the trial court might have found that as of the middle of February 1942 the situation had not taken definite enough form to end the insurance. It is at least questionable whether from the standpoint of the owner or master of the vessel on January 5, 1942, it was clear that the *Portmar* would be retained in Australia (had she not been damaged) for a period well in excess of the expected duration of the voyage. The nature of the governmental restraint was unresolved in the first months following the outbreak of the war and, so far as the record shows, the dominion exercised by the United States Army may have been nothing more than a temporary employment in an unprecedented military crisis. It is improbable that anyone in a position of responsibility was thinking in long-range terms. In January of 1942, the Maritime Commission still planned to have the *Portmar* return to the United States in February with a cargo of chrome ore, and a vessel of her burden might have been more useful as a trans-oceanic cargo carrier. Imputing all the master's knowledge to the owner, it was uncertain whether a return to a North Atlantic port within the expected time was precluded and whether the voyage out of Brisbane (*supra*, p. 8) was beyond the latitude permitted by the charter.

Not only was the situation in January and February ambiguous, but petitioner was unable to maintain communication with its master. What little information it had suggested a short restraint and called for a suspension of judgment until the

fleeting moment of time, irrespective of the anticipations of the parties when the interruption occurred.[20] The court was asked on each occasion to decide, in circumstances where a vessel under time charter was admittedly formally requisitioned,[21] whether the owner or the charterer was entitled to the requisition hire paid by the Government at a rate in excess of that stipulated in the charter. The problem in the final analysis was one of allocating the benefits that flowed from a wartime sovereign act which interfered with the accomplishment of the charter purpose. This allocation had to be on a more or less arbitrary basis since (a) neither the owner nor the charterer expressly assumed to any extent the consequences of war in the agreement, and (b) there is nothing inherent in the nature of the charter to warrant placing these consequences, whether favorable or unfavorable, on one party to the exclusion of the other.[22] Recognizing the impracticability of evolving a detailed formula by which the benefit could be equitably divided between the parties, the court determined, through

---

[20] *The Claveresk*, 264 Fed. 276 (C.A. 2); *The Isle of Mull*, 278 Fed. 131 (C.A. 4); *Tamplin* v. *Anglo-Mexican Petroleum Co. Ltd.*, [1916] 2 A.C. 397.

[21] "[The requisition] made it impossible for * * * [any] private individual to use the [vessel], and did this under circumstances clearly showing to any sensible man that such indefinite taking would almost certainly outlast the life of the charter * * *." *The Claveresk*, 264 Fed. 276, 283 (C.A. 2).

[22] As heretofore noted, p. 33, *supra*, a charter is a contract of affreightment and as such contemplates a state of affairs that will enable the vessel to pursue the charter voyage or voyages without major interruption. War and its implications are completely foreign to the parties' undertakings and are in direct conflict with their implicit assumptions.

the application of the frustration doctrine (see pp. 34-36, *supra*), that the inception of the interruption was to be taken as the point of reference.[23] If it was probable at that time, taking into consideration not only then existing conditions but also subsequent developments, that the restraint would survive the charter term, the charter was to be deemed immediately frustrated and at an end. If on the other hand, the probability, judged by the same standard, was that the restraint would not survive the charter term, the charterer took the loss or gain occasioned by the differential between the charter hire and the requisition hire. In this way, a rough form of justice was meted out in a situation having no relation to the charter purpose itself.

The fixing of the inception of the interruption, or any other precise pre-ordained moment of time, as the point of reference for determining whether the insurance on a vessel has lapsed is another matter. The question is not then one of coping with a development wholly extraneous to the contractual relationship. The insurance policies have as their very purpose the allocation to the underwriters of many, though, perhaps, not all—of the risks of uncertainty. When war protection is asked and given, a higher premium is

[23] "The hardship of applying [this principle] to some cases * * * cannot be denied, but it will be found in the practical administration of justice better to allow even this hardship than for courts to enter upon the confusing, if not impossible, task of adjusting the equities between owner and the charterer." *The Isle of Mull*, 278 Fed. 131, 135 (C.A. 4).

accordingly fell into the error of requiring the insured to carry the burden of uncertainty the underwriters were compensated for assuming.

Also, from the standpoint of public policy, it is undesirable to encourage owners of American vessels to resist governmental orders on the ground, or in the belief, that they will lose war risk insurance protection by acquiescing in informal orders and restraints.

ARGUMENT

The Duration of the War Risk Insurance Policies on the *Portmar*

The war risk policies written on the *Portmar* contained, among other standard provisions, the *Free of British Capture* rider (*supra*, pp. 5-6) which warranted the insurance free of claims arising from Allied "Capture, Seizure, Arrest, Restraint, Detainment, Requisition * * *," excluding, however, unless the vessel be condemned, "losses otherwise covered" by the policies which are caused by "gunfire, torpedoes, bombs, mines or other implements of war * * *" (R. 70). The effect of this rider upon respondent's liability was the subject of controversy in the courts below.[6] The Court of Appeals held that the clause assumes

[6] The chairman of the board of directors of a marine insurance company testified in the District Court that the "losses otherwise covered" clause was inserted in the rider by the American Institute of Marine Underwriters to provide protection while an insured vessel was being detained for inspection (R. 251). The District Court refused to consider this testimony. It held that the rider was not ambiguous and by its terms covered losses caused by gunfire, etc. during any form of Allied capture. See fn. 36, *infra*, p. 58.

relevance only after it has first been established that the policies were still in force on February 19, 1942, the date of the claimed loss. Since the court was of the view that the insurance coverage had previously terminated, it did not consider the meaning of the *Free of British Capture* rider. It assumed *arguendo* that the District Court was right in holding that the rider did not excuse the underwriters on petitioner's claim, if the insurance was otherwise in effect. (R. 793.)[7]

Petitioner contends, and the District Court may have held (R. 747-51), that the *Free of British Capture* rider (along with the so-called "frustration" clause, see fn. 13, *infra*, p. 32) shows, in and of itself, that the policies were to continue in effect throughout the period of control by the Australian and American naval authorities—or, at least, until February 19, 1942 (Pet. Br. 21 *et seq.*). Petitioner also bases an argument (Pet. Br. 28 *et seq.*) on the special "held covered" agreement of February 6, 1942 (*supra*, p. 9). Because of the Court of Appeals' general treatment of the case, we do not consider these arguments but deal solely with the principle of marine insurance frustration laid down below, as that principle was applied to this case. The Court of Appeals held that, whether the *Portmar's* departure from its regular course was voluntary or involuntary, if it worked a frustration

---

[7] The Court of Appeals assumed, in addition, that the *Portmar* became a "constructive total loss" within the meaning of that term as contained in the policies (R. 793). The District Court had made an express finding to that effect (R. 752).

of the underlying commercial venture and in effect substituted an entirely independent one, especially if the new venture resulted in an increase in the risk, the respondents were immediately relieved of their undertaking. The Court of Appeals observed that a charter party is deemed frustrated by a restraint or requisition if, viewed at its inception, the restraint or requisition appears likely to outlast the expected or stipulated duration of the charter period. Applying these principles, the court concluded from its analysis of the situation that the insurance on the *Portmar* ended at Brisbane on January 5, 1942.

We discuss, *first*, the general principles of marine insurance law applicable to departures by insured vessels from the course of the insured voyage, in relation to the duration of war risk policies; and, *second*, the application of those principles to the facts of this case.

A. *The general principles applicable to departures by insured vessels from the regular course of the insured voyage.*

1. There is an implied warranty in every contract of marine insurance covering a vessel or its cargo on a particular voyage that the ship will strictly maintain the regular course of that voyage. *Hostetter* v. *Park*, 137 U.S. 30; *Hughes* v. *Union Ins. Co.*, 8 Wheat. 294; *Coles* v. *Marine Ins. Co.*, 3 Wash. CC 159 (C.C. Pa.); Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 46; 3 Kent, *Commentaries*, 312. This follows from the plain fact that every departure alters the risk which the underwriter assumed

when the policy was written. And on the same reasoning, the implied warranty extends to the time in which the insured voyage ought to be completed. Failure to commence and complete the voyage with the reasonable expedition that the underwriter has the right to expect, in the absence of an express provision in the policies to the contrary, will similarly terminate the insurance. *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 383; *Kingston* v. *Girard*, 4 Dallas 274; *Oliver* v. *Maryland Ins. Co.*, 7 Cranch 487; Marine Insurance Act, 1906, *supra*, § 48; 3 Kent, *Commentaries* 315.

In the event, however, that the vessel is compelled to deviate from its course because of considerations of safety or other circumstances beyond the control of the master or owner, the implied warranty has not been breached. The vessel in this situation is considered not to have deviated, or, in the terms of the English Marine Insurance Act, 1906, her deviation is excusable. *The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718, 727; *Constable* v. *National Steamship Co.*, 154 U.S. 51, 66; *Hostetter* v. *Park*, *supra*, 137 U.S. at p. 40; *Scott* v. *Thompson*, (1805) 1 B & P NR 181; *Driscol* v. *Passmore*, (1798) 1 B & P 200; *Elton* v. *Brogden*, (1747) 2 Strange 1264; *Driscol* v. *Bovil*, (1798) 1 B & P 313; Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§ 46, 49.[8] It makes no difference, accord-

[8] The Marine Insurance Act, 1906, which in large measure is a codification of the common law of marine insurance and the law merchant [*British & Foreign Marine Ins. Co.* v. *Gaunt*, (1921) 2 A.C. 41, 58], provides in § 49 that deviation or delay

ing to the English view at least, that the compelling circumstances have required the vessel to abandon the original *terminus ad quem*. Marine Insurance Act, 1906, *supra*, § 45; *Rickards* v. *Forestal Land Timber & Railways Co., Ltd.*, [1942] A.C. 50.[9] Moreover, it is irrelevant that the departure

---

in prosecuting the voyage contemplated by the policy is excused:

* * * * *

(b) Where caused by circumstances beyond the control of the master and his employer; or

* * * * *

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; * * *

In addition, the section excuses deviations to save human life, to aid a ship in distress where human life may be in danger (§ 49(e)), or to obtain medical or surgical aid if reasonably necessary (§ 49(f)). Cf. *Scaramanga* v. *Stamp* (1880) 49 L.J. C. P. 674; *Lawrence* v. *Sydebotham*, (1805) 6 East 45; *Crocker* v. *Jackson*, Sprague R. 141, quoted in Arnould on *Marine Insurance*, 12th ed. (1939) § 434.

[9] § 45 of the Marine Insurance Act reads:

(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

The distinction between a deviation and a change of voyage has been recognized in this country. As was observed by Chancellor Kent, a deviation becomes a change of voyage when "[T]he original place of destination [is] abandoned, in order to go to another port of discharge." *New York Firemen Ins. Co.* v. *Lawrence*, (1816) 14 Johnson (N. Y.) 46, 57; 3 Kent, *Commentaries* 317. As far as we can determine, there never has been a suggestion in an American decision that a change of voyage has any other meaning than that set forth in the English Act. Cf. *Marine Ins. Co. of Alexandria* v. *Tucker*, 3 Cranch 357.

was necessitated by an uninsured risk [*Scott* v. *Thompson*, (1805) 1 B & P NR 181; Marine Insurance Act, 1906, *supra*, § 49; Arnould on *Marine Insurance*, 12th ed. (1939) § 435, but cf. *O'Reilly* v. *Royal Exchange Assurance*, (1815) 4 Camp. 246], or that the risk of loss from insured perils was increased by reason of it. *Maryland Ins. Co.* v. *LeRoy*, 7 Cranch 26; *Burgess* v. *Equitable Marine Ins. Co.*, 126 Mass. 70; *New York Firemen Ins. Co.* v. *Lawrence*, 14 Johnson (N.Y.) 46; *Middlewood* v. *Blakes*, (1797) 7 T.R. 162, 101 Eng. Reprint 911.[10]

2. It is not open to serious question that the *Portmar* neither deviated nor changed its voyage within the special meaning these terms have been afforded in marine insurance. From the time the vessel arrived at Suva, Fiji Islands, on December 20, 1941, until it fell victim to the Japanese aerial attack in Darwin harbor two months later (February 19, 1942) it was under the complete dominion of Allied military and naval authorities (see pp. 7-11, *supra*). The orders the master received were lawful commands with which he was under a legal duty to comply. *United States* v. *Russell*, 13 Wall. 623; cf. *The Vernon City*, 70 Lloyds List R. 279;

---

[10] In these cases it was stressed that the importance of a departure from the contemplated voyage is the fact that the insured risk is altered, irrespective of whether it is in fact increased. It is this alteration that is excused in the event of an involuntary departure. Cf. *Scott* v. *Thompson*, (1805) 1 B & P NR 181, where the departure was held not to vitiate the policy although the risk of loss from the perils of the sea which the underwriter had assumed was enlarged as a result thereof.

The Ben Hann, 75 Lloyds List R. 187.[11] In addition, his obedience represented the fulfillment of the moral obligation of a United States citizen in charge of a vessel of American registry. As Lord Ellenborough observed, a departure is not voluntary if the vessel has been subjected to a degree of force which "either physically [the master] could not resist, or morally as a good subject he ought not to have resisted." *Phelps* v. *Auldjo,* (1810) 2 Camp. 350, 351.[12]

But it is important to note the grounds and circumstances of the decisions holding that a particular policy was not terminated by an involuntary departure and therefore remained in effect at the time of the claimed loss, for the rule of these cases may not end the matter where dissimilar circumstances are present, as they may possibly be here. (See *infra,* pp. 40 *et seq.*). The two decisions upon which petitioner places principal reliance—*Scott* v. *Thompson,* (1805) 1 B & P NR 181, and *Richards*

---

[11] While the routing orders received subsequent to the vessel's arrival at Suva were issued by Australian authorities, American officials at each port directed the master to obey (*supra,* pp. 7-11). Under the prevailing war conditions, these orders had at least *prima facie* validity.

[12] In the *Phelps* case, a British merchantman while at an Icelandic port was ordered by a British man-of-war to go out to sea to examine a strange vessel. The master's compliance was held a deviation because it was without protest. In light of Lord Ellenborough's remarks it is apparent that the court did not see any clear moral obligation in that instance. It seems doubtful that the same view would have prevailed had the order been given in a period of national emergency. "[R]estraint of princes may consist simply of executive orders of the sovereign * * * for violations of which the carrier may be punished." *Betesh* v. *Fire Ass'n of Philadelphia,* 187 F. 2d 526, 529 (C.A. 2).

v. *Forestal Land Timber & Railways Co., Ltd.*, [1942] A.C. 50—serve as illustrative examples. In the former, the underwriters had issued a policy covering goods on a voyage from Liverpool to Amsterdam. The vessel was approached by a warship while under way and detained by her at Falmouth for a period of six weeks. Upon release the merchantman continued to her destination but was caught en route in a severe storm which caused a sea leak. The insured cargo was found to have been damaged as a result of the leak and the shipper made claim for this damage under the policy. The underwriters claimed that the insurance had ended, but the court held it still in force.

The *Rickards* case involved war risk policies written in August, 1939, on British owned cargo to be carried on three German vessels. When the war broke out, the ships were on the high seas plying the courses contemplated by the policies. Pursuant to orders issued previously to all German merchantmen by the German government, which set forth procedures to be followed in the event of hostilities, the masters first took refuge in neutral ports and then, after varying periods of delay, sailed for Germany (which was not on the insured route). One of the vessels reached its newly acquired destination. The other two, upon being accosted by Allied warships, were scuttled by their crews to avoid capture. The cargo owner made claim for a total or, in the alternative, constructive total loss. Here, too, recovery was allowed.

The holding in each case was that since there had not been a breach of warranty (*i.e.*, a deviation or change of voyage), the insurance was still in force.[13] But these holdings were in circumstances where (1) the restraint operated as an immediate peril from the standpoint of the insured, and (2) this peril was one of which the underwriter was or should have been cognizant. Under such conditions, the insurer may properly be held on his undertaking. As one English text-writer has observed, a marine policy is written with the underwriter's recognition that the vessel, by merely engaging in an ocean voyage, subjects itself to numerous perils, among them restraints of princes and the stresses of weather. Arnould on *Marine Insurance*, 12th ed. (1939) § 435.[14] The underwriter may not be willing, for the stipulated premium, to

---

[13] In *Rickards*, the House of Lords then considered the effect of the standard "Frustration" clause upon respondent's liability. This clause, which is a part of the war risk endorsement on the policies here involved, provides: "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure, caused by arrests, restraints or detainments, of kings, princes, or peoples." Its adoption in 1919 resulted from the decision in *Sanday & Co.* v. *British and Foreign Marine Ins. Co.*, [1915] 2 K.B. 781, [1916] 1 A.C. 650, which read the insurer's undertaking on a cargo policy as extending to loss of the adventure as well as to loss of the goods themselves. The House of Lords concluded that the clause had no applicability where the claim was based on the loss of the goods rather than on the loss of the adventure, the goods remaining unaffected. Cf. *Betesh* v. *Fire Ass'n. of Philadelphia*, *supra*, fn. 12. By the same token a "frustration" clause in a hull policy is not relevant where the claim is, as in the instant case, for the loss of the vessel.

[14] That this is more than a mere legal fiction is clear from an examination of the provisions of any standard marine policy. The basic clauses, endorsements, and riders explicitly cover the liability or non-liability of the underwriter on every common peril.

assume the loss from a particular risk. The insurance in that event will be warranted free of claims arising from that risk, but as to other risks the insured has paid a price by way of the premium and the underwriters have assured those risks in exchange for the premium.

3. For this reason, among others, the Court of Appeals' analogy between an insurance policy on a charter voyage and charter party itself does not seem apt.[15] The charter party is a contract of affreightment whose purpose is to provide the charterer with a defined use of the vessel within a prescribed or expected period. The parties contemplate that the vessel will remain available for this use during the charter period. If, due to the operation of a supervening force beyond the control of either party, the vessel is rendered incapable of performing its charter duties, the foundation of the charter is weakened. And if the unanticipated incapacity is of a nature that suggests a long duration, the foundation is cut away entirely. It is relatively insignificant to the charterer what the cause of the vessel's inability to perform may be. The essential fact is that the vessel cannot go for-

---

[15] The court said: "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer" (R. 801).

It would be strange if the underwriters' liability ceased at the precise moment the contract between the owner and the charterer was frustrated in view of the radically different nature of the two sets of relationships, the rule that doubts are resolved in favor of the insured, and the fact that, as we elaborate *infra*, pp. 36-37, the test applied by the Court of Appeals will have a uniformly unfavorable impact on the insured and a uniformly favorable effect on underwriters.

ward with the voyage upon which the charter was founded.

This is the rationale supporting the principle that a charter party is immediately terminated if a chartered vessel is restrained for a period that, viewed at its inception, is likely to survive the charter. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U.S. 619; *The Claveresk*, 264 Fed. 276 (C.A. 2); *The Isle of Mull*, 278 Fed. 131 (C.A. 4), certiorari denied, 257 U. S. 662; *The Frankmere*, 278 Fed. 139 (C.A. 4), certiorari denied, 257 U.S. 662; *Tamplin S.S. Co.*, v. *Anglo-Mexican Petroleum Co., Ltd.* [1916] 2 A.C. 397; *Heilgers & Co.* v. *Cambrian Steam Nav. Co.*, (1917) 33 Times L.R. 348, affirmed, (1917) 34 Times L.R. 72; *Bank Line* v. *Capel* [1919] A.C. 435; *Countess of Warwick Steamship Co.* v. *Le Nickel Societe Anonyme*, [1918] 1 K.B. 372; *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497. It is nothing more or less than the application of the general doctrine of supervening commercial impossibility, first articulated in England in *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826, to a particular contractual relationship.[16] The continuing availability of the vessel being the main

[16] The *Taylor* case suggested, *contra* to the view taken *in Paradine* v. *Jane* (1647) Aleyn 26 and approved by Lord Ellenborough in *Atkinson* v. *Ritchie* (1809) 10 East, 533, that mutual obligations of a contract may be discharged by supervening impossibility of performance by virtue of an implied term. Subsequently, this principle was extended to cover the situation where circumstances supervene which render performance impossible *in the time contemplated by the parties*. *Jackson* v. *Union Marine Insurance Co.* (1874) L.R. 10 C.P. 125; *Horlock* v. *Beal*, [1916] 1 A.C. 486; *Geipel* v. *Smith* (1872) L.R. 7 Q.B. 404.

circumstance upon the basis of which the parties contracted, the vessel's unavailability in and of itself constitutes a significant alteration, regardless of the particular event from which that disability stems.[17]

It seems to us to follow that a charter party may be deemed frustrated even if the frustration is the result of an occurrence which should have no effect upon the continuation of the underlying insurance protection. If, for example, a neutral vessel under charter were to be detained by a belligerent, and if that detention, viewed at its inception, were likely to survive the date that the vessel was expected to reach the *terminus ad quem*, the charter party would automatically be at an end. *Lloyd Royal Belge Societe Anonyme* v. *Stathatos* (1917) 34 Times L.R. 70, affirming 33 Times L.R. 390.[18]

---

[17] The supervening event held to have frustrated the charter party in the above cited cases (p. 34) was a requisition. The principle, however, has always been broadly stated. "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if * * * the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it." *Texas Co.* v. *Hogarth Shipping Co., supra*, 256 U.S. at 629-30. And there are a few cases dealing with other types of supervening events, *e.g.*, *Lloyd Royal Belge Societe Anonyme* v. *Stathatos* (1917) 34 Times L.R. 70, affirming (1917) 33 Times L.R. 390 (detention); cf. *Allanwilde Transp. Corp* v. *Vacuum Oil Co.*, 248 U.S. 377 (refusal of government to grant sailing clearance).

[18] According to the prevailing view, this is true even if the charter party contains a clause excusing performance during "restraints". As expressed by Lord Haldane in *Tamplin* v. *Anglo-Mexican Petroleum Products Co.*, [1916] 2 A.C. 397,

Selection of the particular moment when the charter ended will ordinarily work out fairly, for though the detention or requisition benefits are denied the charterer from the given date and accrue to the owner, relief from the burdens of charter hire, which is almost axiomatic, is as a general rule equivalent. But there is no similar reason for declaring the insurance at an end. The policy contemplates such detentions and by its terms the underwriter will generally have either accepted liability for risk of loss during detention or negatived that risk by accepting a single indivisible premium no part of which will be returned on the termination of the risk before the anticipated term of protection has ended.[19] The "average reciprocity of advantage" (cf. *Jackman* v. *Rosenbaum*, 260 U.S. 22, 30) normally achieved in the owner-charterer relationship by termination of the char-

406-7, "Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." Cf. *The Claveresk*, 264 Fed. 276, 281-3 (C.A. 2); *Metropolitan Water Bd.* v. *Dick, Kerr & Co.*, [1918] A.C. 119.

This question of the duration of a charter party after a major governmental restraint is to be distinguished from that of the events which will excuse performance under the terms of a restraint clause as constituting a restraint. Cf. *The Styria*, 101 Fed. 728 (C.A. 2), modified on other grounds, 186 U.S. 1.

[19] The fact that the insurance is terminated at a time when the voyage is only partially completed does not entitle the insured to a *pro rata* recoupment. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488-494. Rider F-300 (R. 70) specifically provides against apportionment. See *supra*, p. 6. Thus, an *earlier* fixed date for termination, at the *onset* of uncertainty, will not do as well as a *later* one, since it will defeat the purpose of war risk insurance and apportion the risk unfairly.

ter is not paralleled in the insurer-insured relationship. The insurer will invariably retain the premium and suffer no detriment, while the insured will invariably be disadvantaged by forfeiting continued protection and sustaining the loss of the premium. And since the very purpose of insurance is relief from uncertainty, the insured should be able to make other arrangements for procuring effective insurance protection when the prior insurance ends. If the facts are indeterminate and the situation is fluid, to select with the aid of hindsight the earliest moment as ending the voyage, although a reasonable insured might have viewed the facts differently, shifts the burden of uncertainty from the compensated insurer to its insured, thereby defeating a principal reason for such insurance.

These considerations suggest other sharp distinctions between a marine policy and a charter party. It is usually immaterial whether the charterer and the owner become immediately aware that the charter party has been frustrated by a particular interruption of the voyage. Concededly, it is preferable if they may be advised at all times of the status of their agreement. But unlike the case of the insured, who must at once reinsure if his policy lapses, ordinarily no instantaneous action is required of them if the charter is dissolved. Moreover, the question presented in the charter frustration cases relied on by the Court of Appeals plainly lends itself to the subsequent determination that the charter was frustrated at a particular

charged and paid, and the events of war (or, at least, many of them) produce the hazards insured against. The considerations are far different from those prevailing in the case of a charter party. See also *infra*, pp. 51-58.

4. The voyage deviation cases, as we have seen (*supra*, pp. 30-33), stand for the proposition that when the involuntary departure from the course of the insured voyage is the product of a peril operating on the subject matter of the insurance, the underwriter's liability for a subsequent loss is to be determined by reference to the terms of the policy. The insurance itself, for whatever protection it affords, has not been forfeited and is still in effect, whatever may be the term of the charter for the voyage. It is possible, however, that a particular departure, though under compulsion, is not the result of a peril at all. The most common instance is where the vessel is requisitioned by the Government for a term of years and is put to an entirely new use. It is probable that such a requisition would normally be to the economic advantage of the insured. For the period of its duration he would be relieved of the necessity of seeking cargoes, and the requisition hire received from the Government would in all probability be equal to, if not in excess of, the prevailing rate in private shipping circles. In such a situation—unless the policy provides to the contrary—it would not be fair to read the insurer's obligation as protecting the vessel for the entire requisition period for the single premium which had been determined on the

basis of a particular voyage for a more or less definite anticipated length. Unless specially covered, a substantial requisition use should be regarded, in fairness to the underwriter, as a completely new employment requiring the insured to forsake at some point the coverage purchased on the charter voyage in favor of new insurance applicable in terms to this substituted employment. The question is: Has there been such a requisition, beyond the terms of the charter for which the owner should reinsure? In Point B, we discuss this issue as it relates to the present facts.

B. *Under the applicable principles, it cannot be said that the insurance on the Portmar terminated on January 5, 1942.*

The question, then, is whether, if the *Portmar* departed from the course of its insured voyage, such departure warranted the termination of the insurance on January 5, or at some other date prior to February 19, 1942, in spite of the fact that the departure was involuntary and did not represent a breach of warranty (*supra*, pp. 29-33). We submit that, under the particular circumstances of the case, either the answer should be in the negative or that it would be open to the trial court so to find. We do not contend that respondents would have remained liable on their undertakings for an indefinite period should the vessel have circled Australia, under governmental orders, for the duration of the hostilities. That problem is not before the Court. We suggest, however, that as of the middle of Feb-

ruary 1942, and certainly later than January 5, 1942, the date fixed on by the Court of Appeals, the situation had not taken definite enough form to end the insurance and the policies still covered the vessel against loss from a risk insured.

The Court of Appeals, analyzing the situation some ten years after its occurrence, drew the inference that the *Portmar* had been requisitioned at Brisbane and would have been retained in Australia (had she not been damaged) for a period well in excess of the expected duration of the charter voyage. But it seems questionable (a) whether that inference is compelled by the record to the extent that findings by the District Court were unnecessary,[24] and (b) whether, in any event, that conclusion should have been reached on the basis of the knowledge and expectations of the master of the vessel in Brisbane on January 5, 1942, or of the owner on the same date, which is the standard the Court of Appeals applied ("the situation as it appears at the time of the interruption"; R. 800). In addition, and most significantly, the Court of Ap-

[24] The court read the routing orders received at Brisbane as being the commencement of a requisition "which in every probability would outlast the year [1942] and certainly would extend over six months." (R. 796) The District Court had not made a finding to that effect, and it does not appear that the record constrained such a finding. For reasons which we shall develop later, we think that this was a disputable finding of fact which should have been left to the District Court, and that its inevitability is debatable regardless of whether it is approached from the vantage point of the master at Brisbane on January 5, 1942, the ship owner at that time, or the Court of Appeals in 1952. Hence, the lack of a finding of fact by the District Court was not an oversight or omission which should be supplied, even in admiralty, by an appellate court.

peals read the policy as coextensive with the voyage charter (R. 801)—a criterion we believe to be incorrect (*supra*, pp. 33-40)—and its findings were therefore vitiated, in our view, by an erroneous legal standard and not entitled to the ordinary weight.

1. The nature of the governmental restraint, in terms of duration and impact upon petitioner, was entirely unresolved and indefinite in the first months following the outbreak of the war in December 1941. The vessel was not formally requisitioned by the United States until November 1942 (R. 625). Furthermore, the Government did not take possession of her until after the Darwin attack on February 19, 1942. She was in Australian waters during January and the early part of February 1942, pursuant to a series of routing orders issued by Australian naval authorities. The master was directed to comply with these orders by various United States Consuls and individual American naval and army officers. The United States Army exercised some degree of dominion over the vessel in that it determined the cargo that was to be carried between ports. But, as far as the record shows, that was nothing more than a temporary employment occasioned by an immediate and pressing military crisis (R. 279-97). The assurances of the American officials relative to the propriety of the Australian routing orders were couched in terms of the necessity of cooperating with that government (R. 280-91). At no time did any of these officials suggest to the master (nor did he under-

stand) that the vessel was being taken over by the United States and that the Australians were concerned solely with the problems of navigation. Nor did they indicate on any occasion that the vessel would be held in Australia beyond the accomplishment of the mission at hand (see R. 279-97). It is improbable that anyone in a responsible position was thinking in long-run terms. Military operations were undoubtedly on a day-to-day basis with continuous adjustments being made to meet changing conditions. When the *Portmar* was ordered to proceed from Darwin to Wyndham with 2,000 drums of gasoline, the master protested that this was not a proper use for a vessel of her size and suggested that a smaller vessel be substituted. The answer was that the situation, being desperate, necessitated rapid action and, since the *Portmar* was the most available vessel for the mission at the time, it had to be dispatched. (R. 290-1.)

The Court of Appeals attached considerable weight to the testimony of an American colonel who first arrived at Melbourne in the middle of March 1942 to take charge of water transportation in the Southwest Pacific area (R. 795). This officer, after referring to the seriousness of the military situation, stated that the military took control of "[e]very vessel we could get our hands on" and that these vessels were held during the rest of 1942 and sometimes longer (R. 186-7). While this testimony does suggest that the *Portmar* might have been restrained indefinitely, that conclusion is not ineluctable; it is equally possible, if not probable,

that the colonel's superiors in Washington would have regarded the *Portmar's* use as trans-oceanic cargo carrier or troopship of greater strategic importance.[25] And the Maritime Commission, in January 1942, still planned to have the vessel return to the United States some time in February with a cargo of chrome ore (*supra*, p. 9) (R. 142-3). At that time the war was in its second month, and official bodies in this country were aware, in general outline at least, of its progress. Whether or not the Commission could have carried out this plan, if in February it still harbored it, is not answered by the record. Certainly, however, a reasonable possibility existed that the Commission could have given effect to determinations that it made. Moreover, the colonel was testifying primarily as to events subsequent to February 19, 1942, and the measures that were instituted in the light of those events. It may be that in April or May of 1942, a disinterested observer would or should have recognized that it was the intention of the responsible officials in the area to requisition for an indefinite period all available means of transportation. The colonel or another officer may have even expressed this intention, but their desires had to be reconciled with the needs of other theatres of war and with the orders of superiors taking an overall view.[26]

---

[25] If conditions in the southwest Pacific were as bad as the colonel's testimony indicated, the War Department might well have decided that the further use of the *Portmar* in Australia would be futile (R. 184-7).

[26] In February 1942, the War Shipping Administration was established with authority to control the operation of all American ocean-going, non-combatant vessels. The Admin-

Hence, it does not follow that on January 5, or at any time up until February 19, it was or should have been apparent, to one with the access and exposure to information of the master, that the vessel would be retained. Nothing in the colonel's testimony suggests that the orders given the vessel on January 5 constituted a single requisition of considerable duration or the forerunner of an unbroken chain of requisitions (R. 188-99). And these orders, on their face, were merely a direction to proceed from Brisbane to Darwin without any indication of a subsequent use (R. 287).[27] From the standpoint of the master, and imputing all his knowledge to the owner, it was by no means clear that a return to a North Atlantic port within the expected time was out of the question nor even that

---

istrator was directed, in exercising this control, to comply with strategic military requirements and to collaborate with all interested agencies in order to secure the most effective utilization of shipping in the prosecution of the war. Executive Order 9054, February 7, 1942, 7 F.R. 837. A pooling of American shipping was in contemplation.

[27] A substantial portion of the cargo carried to Darwin was high-octane gasoline brought by the *Portmar* from the United States (R. 285-6, 715, 720-21). Since the northern part of Australia was a very critical area during early 1942 (R. 184), the master could have easily interpreted the Brisbane orders as being merely the result of a decision that the gasoline could be employed to best advantage at Darwin. In any event, it would have been strange indeed if he had taken these orders to constitute a requisition of the vessel or to have been an unmistakable preliminary step toward a requisition. And the fact is that he clearly did not regard the vessel as having been put to other than an accommodation use.

The insurance specified that the voyage was to *ports* in the Philippines (or Australia). The master was aware that the charter spoke in the same terms. His practical construction that his activity after January 5, 1942, was related to the charter is entitled to some weight.

the voyage out of Brisbane was outside the terms of the charter and the latitude it permitted.

2. Quite apart from the inherent ambiguity of the situation, and aside from knowledge imputed to it through a master who could not communicate, petitioner did not possess at any time prior to February 19, 1942, sufficient information to evaluate the nature and extent of the voyage interruption. What little information it had suggested a short restraint. The prudent course may well have been to suspend judgment until the situation might be appraised with more assurance after the trend was more definite.

The first post-Pearl Harbor word of the vessel petitioner received came on January 19, 1942, which was two weeks after the time when, in the opinion of the Court of Appeals, the insurance had terminated (R. 720). On that date, petitioner was informed by the Maritime Commission's agent on the charter that the vessel was then in Australia but would load on her return voyage at New Caledonia during the latter part of February for discharge in Philadelphia in April (R. 142-3). An explanation for the vessel's being in Australia was not given. Petitioner assumed, however, that it was the result of orders issued by the Government. (R. 145.) This was a perfectly logical inference in the light of the outbreak of the war and conditions in the Pacific as reported in every newspaper. Manila was in danger of Japanese capture from the outset and in fact had been declared an open city on December 25, 1941. See *United States v. Caltex (Philippines), Inc.*, No. 16, this Term, de-

cided Dec. 8, 1952, slip op. p. 2. It therefore could be presumed that the officials in charge of the prosecution of the war would have diverted a Manila-bound vessel to another port in the interest of preserving her and her cargo.[28] But it would have taken a high degree of clairvoyance to have foreseen that the vessel would be retained in Australia for any appreciable period of time. The insured is asked to draw a definitive graph when only a few closely clustered points were known. The private citizen with no knowledge of the specific problems presented by military operations and logistics in the Australian war zone might well have presumed that a large cargo vessel would be sent back to the United States, immediately upon discharging its cargo, for further employment on intercontinental voyages. In this particular case, however, petitioner did not need to indulge in such speculation since it was explicitly informed that the Maritime Commission intended to return the *Portmar* within approximately a month (R. 143). It may be that the Commission did not know of the military use to which the vessel had been placed. As the Court of Appeals observed (R. 797), the record is barren on this point. But petitioner certainly had the right to rely on the representations made by the Commission, at least where there was nothing to indicate that the return voyage was a physical or practical impossibility.

---

[28] And as the vice president of petitioner observed: "We knew our captain; we knew that he would not have gone to Australia except for Government orders" (R. 145).

There was no lack of diligence on the part of either petitioner or its employees. During December 1941, petitioner contacted the Navy Department in Washington and naval officials in San Francisco in an effort to determine where the vessel was and what she was doing. The only information forthcoming was to the effect that the vessel was "safely afloat" (R. 141). And the master of the *Portmar*, who was the only responsible employee with first-hand knowledge of the restraint, endeavored at every port of call to cable petitioner as to what had occurred. On each occasion, he was told that cable messages could not be transmitted because of considerations of security or the inadequacy of communication facilities. (R. 718-9.) In addition, the master wrote a letter to petitioner from the Fiji Islands in the latter part of December 1941, explaining the developments up to that point. The letter was not received. (R. 718.) It was not until March 24, 1942, that the master, having just arrived in Melbourne, Australia, was able to communicate effectively with his employer. His cablegram of that date, advising of the condition of the vessel, followed by over a month the February 18 letter from the Maritime Commission and the telegram from the War Shipping Administration on February 23, by which petitioner first learned of the specific location of the ship and of the Darwin attack. (R. 145-146, 603-4.) On April 1, 1942, the master sent another cable which briefly summarized the vessel's movements up to February 19 (R. 603). Thus,

it was the very day of the claimed loss (February 19, 1942) before petitioner knew anything more than that the *Portmar* was in Australia and five weeks more before its precise routing was made clear. As far as petitioner could ascertain on February 19, 1942, the vessel was literally as well as legally on the course of the insured voyage, which had been extended earlier in the month to Australia by agreement of the underwriters (*supra*, p. 9) (R. 720).

3. The foregoing discussion demonstrates, we believe, that the situation at Brisbane on January 5, 1942, was susceptible of more than one interpretation insofar as the course of future events was concerned. The Court of Appeals chose, in 1952, to draw one inference as to the nature of the restraint imposed upon the *Portmar*. But on January 5, 1942, other inferences were at least equally possible and consistent with the facts, as we have just shown.[29] In these circumstances, it was the function of the District Court and not the Court of Appeals to determine, in the first instance, the nature of the restraint as it was objectively and, we submit, as it must have appeared to the insured. *Fountain* v. *Filson*, 336 U.S. 681.

It is clear from the findings of fact and conclusions of law filed by the trial court that it did not.

---

[29] Respondents' position at trial was that the insurance terminated "when there was a determination to do something with the vessel other than make it a round trip back to the United States." This occurred in respondents' view at Wyndham on February 8, 1942. (R. 113.) In our view, it is doubtful that any such determination was ever made before the claimed loss, consciously or unconsciously, by the American authorities.

undertake to make any such determination. Judge Ryan had apparently regarded the *motivation* for the vessel's departure from the insured voyage route, and nothing else, as material on the termination question (R. 744-5), and therefore, although he did reject respondents' contention that the homeward voyage had been voluntarily abandoned (R. 746), he did not concern himself with the question of the probable duration of the restraint. As far as may be determined from the record, neither petitioner nor respondents adduced their proof in the District Court on the basis of the principles subsequently laid down by the Court of Appeals.[30] Therefore, once the court of appeals decided that the nature and prospective duration of the restraint was the crucial issue, it should have remanded the case for further proceedings instead of disposing of the matter itself by way of the debatable assumption that a lengthy requisition had been instituted. However consistent with the facts it may be to view the developments at Brisbane as a seizure initiating a requisition, or a series of requisitions, that would outlast the probable length of the charter, that theory is not the only tenable or reasonable one entirely consistent with the facts then known. The finding is of the type that should ordinarily be left to the trial court to make upon a complete record specifically designed for that purpose.

4. Furthermore, the Court of Appeals concluded

---

[30] The Court of Appeals said: "We have found no decision under a marine policy which is certainly relevant * * *" (R. 798).

that the insurance was forfeited at Brisbane on January 5, without determining what petitioner's expectations were or should have been at that time. It seems that the court did not regard them as having any significance whatsoever. It said that "we must interpret the written words [of the policy] by trying to place ourselves in the position of the parties, had they been faced in advance with the actual event: the seizure at Brisbane. * * * we cannot believe that they would have agreed that the [restraint of princes] clause so far transmuted the undertaking." (R. 802). It may be that had petitioner been faced with this particular "restraint" in advance, and had it felt obliged to give it the same connotation that the court selected, it would have seen the occasion as warranting the purchase of new coverage before the voyage started. But petitioner was in fact confronted with the Brisbane routing orders on January 5 (if the knowledge of the master is imputed to his employer), and it cannot be assumed that at that moment its proper expectation was that the vessel would stay in Australia beyond the time it was due in Philadelphia (in April 1942) and that as a consequence all insurance was ended.

The consequences of a forfeiture of insurance are both serious and unfavorable. The premiums paid must be regarded as totally spent, and nothing is recoverable from the underwriter. See *supra*, pp. 36-37. This means that in the event that the insurance on the *Portmar* ended at Brisbane, respondents received a substantial windfall because al-

though they had demanded and obtained a premium of about $13,000 for the undertaking of certain risks over a period extending from late November 1941 to April 1942, for three months of that period they would have been exposed to no risks whatsoever, and the termination of the risk would have coincided almost exactly with the most acute stage of the insured's need for war risk insurance. Petitioner was certainly not required to regard an order to proceed from one Australian port to another, primarily for the purpose of discharging the government-owned cargo brought from the United States, as entailing the loss of insurance coverage and entitling the insurers to regard the entire premium as earned.[31]

The question remains whether the legitimate expectations of petitioner on January 5 are a pertinent consideration. When the essential nature of war risk insurance is taken into account, it is difficult to see how these expectations can be ignored. Petitioner purchased war and marine risk coverage in the first place because it was economically undesirable for it to assume the risk of loss. The

[31] It is well settled that a construction of an insurance policy which will work a forfeiture of coverage is to be avoided wherever possible. *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U.S. 234; *Travelers Protective Ass'n* v. *Jones*, 91 F. 2d 377 (C.A. 5). As was said by the Second Circuit in *Henjes* v. *Aetna Ins. Co.*, 132 F. 2d 715, 719: "Had the insurers meant to have a breach of the warranty put the [vessel] beyond the coverage of the insurance for the remainder of the term while the premium based upon insurance for the whole term was kept they should have made that convincingly clear." This language would seem to be even more pertinent where no breach of warranty is involved and the question is whether an event totally beyond the control of the parties forfeited the coverage. Cf. fn. 32, *infra*.

continuation of that coverage, or the substitution of other and equally effective coverage, was at all times a matter of vital importance to it. If the existing insurance terminated, petitioner had simultaneously to take steps to reinsure. The policies on the *Portmar* would hardly have served their purpose if they abruptly expired at a time when petitioner had good cause to believe that they continued in force and when the war risk was at its height.[32] If war risk insurance is not to be a misnomer, the insured must be afforded such time as is reasonable in the circumstances of the individual case to appraise an evolving situation, to recognize its implications, and then to obtain new coverage to the extent that the situation requires.[33]

---

[32] Respondents' awareness of the imperative necessity of continuous protection is demonstrated by the presence of the "Held Covered" clause in the policies, by the terms of which they agreed to hold the vessel covered "in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." (R. 70). As the District Court noted, this clause is not applicable in the instant situation because no breach of warranty is involved (R. 751). Had the *Portmar* voluntarily and without reasonable cause left the insured route and pursued another, it is clear that the insurance would have continued, providing petitioner complied, *upon learning of the departure* with the conditions contained in the clause. This being the case, it would be anomalous to read into the policies an understanding that a departure, not a breach of warranty but instead the consequence of war operations, forfeits war risk coverage immediately, irrespective of the anticipations or knowledge of the insured.

[33] By fixing January 5 as the moment when the insurance lapsed, the court below made it virtually impossible for petitioner, in any circumstances, to maintain an unbroken chain of coverage. Even when it is recognized that reinsurance is necessary, it takes time to procure it. While the record is not

In this respect, as we have pointed out above (*supra*, pp. 33-40), a marine insurance policy differs from a voyage charter, which can properly be deemed ended from the very inception of the governmental interruption. Unlike a charter party, a marine war risk insurance policy is designed to cast much, if not all, of the risk of uncertainty on the underwriter, and it contemplates the occurrence of wartime events and circumstances. Here, the insurance was taken out at the end of November 1941, when the risk was substantially increased by virtue of world conditions. It was not known then whether the existing tensions between the United States and Japan would erupt into hostilities while the *Portmar* was on the voyage. Further, it was unascertainable what direct impact war would have on the vessel if it did break out. For these reasons, petitioner was willing to pay the larger premium demanded for protection against the consequences of war as well as the perils of the sea. In these circumstances, it is appropriate to hold the underwriters for a longer period, after a governmental interruption, than would be true in the case of a charter. Having accepted the war risk premium, respondents cannot argue with persuasive force, as can the parties to a charter, that an event which is a direct result of war can sharply cut off all contractual rights and obligations. The

---

of assistance on the point, it is uncertain whether the master could have obtained new coverage in Brisbane before the vessel departed. Petitioner, in New York, certainly could not have taken the necessary steps to reinsure since it was not even aware that a restraint had been imposed, if, indeed, the operations were not within the terms of the charter.

risk of uncertainty rests more logically on the insurer. From the standpoint of petitioner as an insured, the *Partmar* remained in danger of loss after the interruption first took place on January 5; the situation at that time was fluid and indeterminate and it was unclear how long the interruption would really last; the legitimate expectations of petitioner were that insurance coverage continued.[34] During a period of uncertainty as to whether there was to be a long-term requisition, and until the situation could be clarified, the insurance should protect against loss as a result of war risk.

The short of the matter is that while we have no quarrel with the basic proposition that, in the absence of special provision in the policy, if a vessel covered by a voyage policy is requisitioned for a period beyond the voyage the owner must undertake to reinsure, we submit that the situation must bring home to the insured at the time that such a

---

[34] In a comparable situation it has been said:

"* * * The court is obliged to put itself in the position of the actors, 'and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate.' The Styria, 186 U.S. 1, 9 * * *. What the shipper had the right to demand of the carrier was, not infallibility, but the exercise of a reasoned judgment of the situation as it appeared at the moment; having regard to the rights of all concerned." *De La Rama SS Co.* v. *Ellis*, 149 F. 2d 61, 64 (C.A. 9). This Court had added in *The Styria* that what is expected "* * * of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considered judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not." 186 U.S. at pp. 9-10.

requisition has occurred.[35] And a reasonable opportunity must be afforded thereafter to obtain the new coverage that the changed circumstances necessitate. In this case, the Court of Appeals erred, we believe, in holding the insurance terminated on January 5, 1942. The court's position does not take account of the incidents as they were known to the master and his owner, as well as the unresolved nature of the situation during January and February 1942. The result is to require the insured to carry the burden of uncertainty for which it relied on its purchase of war risk insurance.

5. We add, briefly, a final factor which we believe should be given weight. From the standpoint of public policy it is undesirable to require or encourage owners of American vessels to resist governmental orders such as those involved here, on the ground or in the belief that their war risk insurance coverage will be ended if they agree to informal orders and "restraints". One effect of the Court of Appeals' rule is that owners and masters may tend to try to avoid compliance with day-to-day orders, or may insist on full-scale formal requisitions with definite time limits. No rule seems realistic which, in the face of the dependence of the national welfare on the merchant marine, in-

[35] It is of interest that the owner has never claimed that the developments at Brisbane constituted a termination of the charter and the substitution of a requisition, and that its practical construction at the time is inconsistent with the theory of an indubitable requisition accepted by the Court of Appeals.

hibits American flag vessels from speedily and amicably performing emergency missions, or tends to constrain a higgling attitude in the shipowner in emergencies when pecuniary considerations are least justifiable.

For these reasons, we suggest that the Court of Appeals erred in the general rule it declared and in holding the insurance terminated on January 5, 1942. The Court may desire to remand the case for consideration of the facts in the light of the preferred principles which we urge, or it may feel that it can itself hold the insurance to have been in force on February 19, 1942, the date of the claimed loss at Darwin. In either event, the case has to be remanded for consideration of other defenses which have not yet been passed upon by the Court of Appeals—unless, of course, this Court should also desire to pass upon these other points.[36]

---

[36] Even if the insurance survived the events of January and February 1942, respondents are not liable on the claimed loss unless they assumed the risk of an enemy attack during a period of allied restraint. *Swan* v. *Union Insurance Co. of Md.*, 3 Wheat. 168; *New Orleans, T. & M. Ry. Co.* v. *Union Marine Ins. Co.*, 286 Fed. 32 (C.A. 5). Respondents contended below that the *Free of British Capture* rider warranted the insurance free of claims arising during such restraints unless the vessel was detained merely for inspection purposes. See fn. 6, *supra*, p. 24. The rider does not say so and its language does not suggest so limited an application. If, in spite of the canon *contra proferentes* (*cf. Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U.S. 311; *McMaster* v. *New York Life Ins. Co.*, 183 U.S. 25; *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494), respondents prevail on this question, the fact that the insurance was in effect on February 19, 1942, will be of little practical significance. On the other hand, petitioner may be held to have